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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 282

ALMA SCHULZ, Administratrix of the Estate of August M. Schulz,

Petitioner,

—v.—

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF ON THE MERITS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Statute Involved 2

Statement 7

Summary of Argument 10

POINT I—

The evidence, together with the inferences arising therefrom, would have supported a verdict in favor of plaintiff, so that it was error for the trial judge to direct a verdict for defendant 11

POINT II—

A jury could have found from the evidence that the deceased was covered by the provisions of the Jones Act 28

CONCLUSION 35

CITATIONS

	PAGE
Cases:	
Armit v. Loveland, 115 F. 2d 308 (3 Cir. 1940)	18
Blair v. Baltimore & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945)	12
Boston & M. R.R. v. Cabana, 148 F. 2d 150 (1 Cir. 1945), cert. den. 325 U. S. 873, 65 S. Ct. 1414, 89 L. Ed. 1991 (1945)	20
Bowen v. Shamrock Towing Co., 139 F. 2d 674 (2 Cir. 1943)	31
Brabazon v. Belships Co., 202 F. 2d 674 (3 Cir. 1953)	17
Carumbo v. Cape Cod S.S. Co., 123 F. 2d 991 (1 Cir. 1941)	34
Casey v. American Export Lines, 173 F. 2d 324 (2 Cir. 1949), rev'd on other grounds, 176 F. 2d 337 (1949), pet. cert. denied 338 U. S. 885, 70 S. Ct. 189, 94 L. Ed. 544 (1949)	14
Cortes v. Baltimore Insular Line, 287 U. S. 367, 53 S. Ct. 173, 77 L. Ed. 368 (1932)	13
Cox v. Roth, 348 U. S. 207, 75 S. Ct. 242, 99 L. Ed. 260 (1955)	12
Gahagan Const. Corporation v. Armao, 165 F. 2d 301 (1 Cir. 1948), cert. denied 333 U. S. 846, 68 S. Ct. 905, 92 L. Ed. 1152 (1948)	30
Gold v. Groves, 182 F. 2d 767 (3 Cir. 1950)	20
Hanley v. Erie, 273 App. Div. 257, 77 N. Y. S. 2d 153 (1948), affirmed 298 N. Y. 816, 83 N. E. 2d 861 (1949)	16
Johnson v. Griffiths S.S. Co., 150 F. 2d 224 (9 Cir. 1945)	15
Johnson v. Palmer, 129 F. Supp. 202 (E. D. N. Y. 1953), aff'd 220 F. 2d 729 (2 Cir. 1955)	19

PAGE

Johnson v. United States, 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 468 (1948) 12

Kangadis v. United States, 121 F. Supp. 842 (S. D. N. Y. 1954) 20
Koehler v. Presque-Isle Transp. Co., 141 F. 2d 490 (2 Cir. 1944), cert. den. 322 U. S. 764, 64 S. Ct. 1288, 88 L. Ed. 1591 (1944) 13

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946) 2, 11
Long Island R. Co. v. Lowe, 50 F. Supp. 944 (E. D. N. Y. 1943) 31
Lukos v. Chesapeake & O. Ry. Co., 120 F. Supp. 296 (W. D. Mich. 1954) 33

McDonough v. Buckeye S.S. Co., 103 F. Supp. 473 (N. D. Ohio 1950) 14

Pearce v. Lehigh Valley R. Co., 157 F. 2d 252 (3 Cir. 1948) 16
Perry v. U. S. Employees' Compensation Commission, 27 F. 2d 144 (N. D. Cal. 1928) 31
Pollard v. Seas Shipping Co., 146 F. 2d 875 (2 Cir. 1945) 31

Sadler v. Pennsylvania R. Co., 159 F. 2d 784 (4 Cir. 1947) 2, 16
Schantz v. American Dredging Co., 138 F. 2d 534 (3 Cir. 1943) 31
South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 488 (1940) 29, 30
Stark v. American Dredging Co., 66 F. Supp. 296 (E. D. Penna. 1946) 13
Stone v. New York C. & St. L. R. Co., 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441 (1953) 12

PAGE

Summerlin v. Massman Const. Co., 199 F. 2d 715 (4 Cir. 1952) 30, 31

Sweeting v. Pennsylvania R. Co., 142 F. 2d 611 (3 Cir. 1944) 13

Texas Company v. Gianfala, 222 F. 2d 382 (5 Cir. 1955), reversed, — U. S. —, 76 S. Ct. 141, — L. Ed. — (1955) 30

The Emmy, 55 F. Supp. 60 (S. D. N. Y. 1944) 31

United States v. Fotopulos, 180 F. 2d 631 (9 Cir. 1950) 13

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949) 12

Wilkes v. Mississippi River Sand & Gravel Co., 202 F. 2d 383 (6 Cir. 1953), cert. denied, 346 U. S. 817, 74 S. Ct. 29, 98 L. Ed. 344 (1953) 30

Statutes:

33 U. S. C. §§902, 903, 905 ..... 4, 5, 6

45 U. S. C. §51 3

46 U. S. C. §688 ..... 2, 7

must be given a liberal interpretation. We think that it includes any knowing or careless breach of any obligation which the employer owes to the seamen. * * * "

In *Casey* v. *American Export Lines*, 173 F. 2d 324 (2 Cir. 1949) the deceased, the master of defendant's vessel, died in a fire on board. There was no evidence showing how or where the fire started. The plaintiff claimed there was a failure to have proper fire watches and failure to effectively and promptly combat the fire. A verdict for plaintiff was affirmed. Judge Swan stated among other things at page 327:

" * * * It must also be conceded that the precise moment of Capt. Casey's death is unknown and that even if the fire had been discovered promptly and if the inside firehose had been available under sufficient pressure without any delay, one cannot know with certainty that the captain's life would have been saved. * * * But almost every verdict of a jury involves the element of speculation or conjecture to some extent. * * * "

Then at page 328 he stated:

" * * * In our opinion the causal relation between the negligence and the death was a question for the jury."

In *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473 (N. D. Ohio, 1951) the deceased returned in an intoxicated state from shore leave with the assistance of another seaman who was sober who left him on the dock when he fell and refused to rise. Two weeks later the body of the deceased was discovered in the river, the death having

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 83, 84) is reported at 222 F. 2d 540 (2 Cir. 1955).

Jurisdiction

The judgment of the Court of Appeals was entered May 3, 1955. On August 1, 1955 the petition for a writ of certiorari was filed and was granted November 7, 1955. The jurisdiction of this court is found in 28 U. S. C. 1254(1) and 1201(c).

Questions Presented.

1. Whether the Court of Appeals in affirming the judgment of the Court below erroneously differed with the opinion of the Court of Appeals for the Fourth Circuit in the case of *Sadler* v. *Pennsylvania Railroad*, 159 F. 2d 784 (4 Cir. 1947), which held that proximate cause need not be established by direct evidence but may be proved by circumstances and which also held that it was for the jury to determine the cause of the fall from the reasonable inferences which cannot be said to be speculative.

2. Whether the Court of Appeals in affirming the judgment of the Court below erroneously deviated from the principles of law established by this Court in the case of *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946), and in failing to grant a retrial and permit the case to go to the jury to settle the dispute by choosing the most reasonable inference and that this did not involve speculation and conjecture.

3. Whether the trial court erred in refusing to admit evidence concerning the hazards of crossing from tug to tug, and in refusing to admit other circumstantial evidence.

Statutes Involved

The Jones Act, 46 U. S. C. A. 688 (1948 Ed.) provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway em-

ployees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

F. E. L. A., 45 U. S. C. A. §51 (1954 Ed.) provides:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

L. H. W. C. A., 33 U. S. C. A. §902 (1950 Pocket Part) provides in pertinent part:

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

* * * * *

(9) The term "United States" when used in a geographical sense means the several States and Terri-

tories and the District of Columbia, including the territorial waters thereof.

* * * * * *

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

* * * * * *

(16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

* * * * * *

(19) The singular includes the plural and the masculine includes the feminine and neuter. Mar. 4, 1927, c. 509, § 2, 44 Stat. 1424 as amended June 25, 1938, c. 685, § 1, 52 Stat. 1164; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F. R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F. R. 3178, 64 Stat.

L. H. W. C. A., 33 U. S. C. A. 903 (1950 Pocket Part) provides:

Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, §3, 44 Stat. 1426.

L. H. W. C. A., 33 U. S. C. A. §905 (1950 Pocket Part) provides:

Exclusiveness of liability. The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Mar. 4, 1927, c. 509, §5, 44 Stat. 1426.)

Statement

The plaintiff is the widow of the deceased, August M. Schulz, Jr., and she sues as the administratrix of his estate. Her complaint is based on the Jones Act, Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. 688 (R. 1). The defendant, in its answer to the complaint admitted that the tug boat "Altoona" was docked or moored at Pier H, Jersey City, Hudson County, State of New Jersey, a pier owned, operated, managed, and controlled by the defendant, Pennsylvania Railroad Company (R. 2, 4). It set forth as defenses (1) assumption of risk by deceased and lack of negligence by defendant, (2) sole negligence of deceased, (3) contributory negligence as a partial defense, (4) the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as LHWCA for convenience and brevity) provide an exclusive remedy (R. 4, 5).

The case came on to be heard before the Honorable David N. Edelstein. At the trial it was conceded by the defense that the deceased did not commit suicide and no foul play was involved in his death. It was also conceded that the deceased was an honorable man (P8).

Mrs. Schultz testified that the last time she saw her husband alive was on Christmas Day at about 2:30 in the afternoon when he left for work. He took his lunch with him in a paper bag (R. 9). James H. Corcoran, a crew dispatcher for the defendant on December 25, 1949 testified that he had assigned the deceased to "watch" a certain number of tug boats (R. 9). He stated that the deceased had been due to start work at 5:00 p. m., that the deceased had called earlier to say he'd be late because he missed the bus or train connection, and he arrived about 5:15 p. m. (R. 10). Mr. Corcoran assigned a Mr. Barker to check

the tug boats until the deceased came in (R. 10). The deceased was given a sheet when he arrived and he went to the boats in his street clothes (R. 11). He came back to Mr. Barker's office at the outer end of Pier H (toward the water) at about 7:00 p. m. (R. 9, 11). The deceased stated he had just completed rechecking the boats and he was going in to change his clothes and go to work (R. 11). He left the office and was seen walking up the dock toward the "Altoona" (R. 12). That was the last time this witness saw the deceased. The witness was to work until 11:00 p. m. and the deceased until 1:00 p. m. (R. 12). The witness stated the deceased had appeared sober and fit for work (R. 16).

Frederick A. Stetson, another of defendant's employees who was an assistant foreman of engines, testified that at about 12:15 he went to the "Altoona" and found that her fires were practically out (R. 19). He reported this to Ernest Brenhaus who was the crew dispatcher (R. 20). The first time he went on board he didn't look for clothing. The second time he saw some street clothes hanging on the bulkhead of the engine room of the vessel (R. 21). This place was where the firemen usually undress (R. 22). He found out later that the clothes belonged to the deceased (R. 22).

Thomas L. Brennan of the Jersey City Police Department testified. He brought the Police Department records. He read various entries into evidence (R. 28).

The report stated that on January 31, 1950 at about 11:55 a. m. the body of the deceased was found floating in the water off Pier F. It also stated that when "the body was found in the water there was a flashlight in one of his hands" (R. 29). His grip with his overalls had been found on the "Altoona" (R. 39). The file of the county physician contains the notation "had flashlight in hand when taken out of water. Only underwear and shoes on" (Pl. Exh. 1).

There were no lights on the tugs (R. 13, 14, 37, 44). There was evidence establishing that it was dark on the tugs (R. 38, 48, 51). The deceased was assigned to four tugs. The other employees of the defendant who testified had been assigned to two each (R. 37, 38, 49, 55). One employee testified that a fireman wasn't actually capable of taking care of more than two tugs (R. 47). There was also evidence that it was a cold winter night (R. 24, Pl. Exh. R. 82a). The injector on the "Williamsport" had been turned on during the watch of the deceased and was found in that condition (R. 40). There are other significant details which are discussed more fully under Points I and II.

The court refused to permit plaintiff's attorney to question defendant's employees about the extent of the darkness (R. 18, 43, 53), about the danger involved in crossing from tug to tug (R. 26); about the use of a flashlight in crossing from tug to tug (R. 58); about the manner of crossing from tug to tug (R. 46, 47); about the circumstances under which it would be necessary to put an injector on and the necessity of doing so to protect the boiler (R. 51). The petitioner includes all these rulings as subsidiary questions on this appeal as the facts relating to the extent of darkness, the manner of crossing from tug to tug and the hazards involved, and the reasons for turning on injectors on tug boilers are all additional facts which would assist a jury in making its findings.

The trial judge directed a verdict on behalf of defendant stating there was no proof of causal relationship (R. 56). He explicitly refrained from ruling on respondent's defense under the LHWCA (R. 57). On appeal, his ruling was affirmed (R. 83).

Summary of Argument

In the present case there were facts from which a jury could have found:

(1) The deceased was a member of the crew of the four vessels to which he was assigned as a watch fireman.

(2) The deceased died by drowning on December 25, 1949 between 7:00 p. m. and 10:00 p. m.

(3) The deceased died while hurrying from tug to tug while in the course of his duties.

(4) The defendant was negligent in assigning him to four tugs instead of two.

(5) The defendant was negligent in not providing sufficient light.

(6) The deceased fell into the water as a result of such negligence and died of drowning.

The evidence was circumstantial in nature. Under the liberal interpretation of the Jones Act and the broad scope of the jury's function as the finders of fact, the trial court erred in directing a verdict for defendant. In addition, the court erred in excluding certain evidence. The questions of fact presented by the evidence and the inferences to be drawn therefrom should have been submitted to the jury.

POINT I

The evidence, together with the inferences arising therefrom, would have supported a verdict in favor of plaintiff so that it was error for the trial judge to direct a verdict for defendant.

The trial judge based his decision on the alleged failure to prove proximate cause. He conceded that there was some evidence of negligence (R. 56). The Court of Appeals likewise based its decision on the question of proximate cause. (R. 84).

In the case of *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946), a suit under the Federal Employers' Liability Act, 45 U. S. C. §51 (hereinafter referred to as the FELA), a judgment for plaintiff which had been set aside by the Supreme Court of Missouri was reversed by this court. The deceased had been found lying face down on the ground near the tracks. He had been struck on the back of the head. There were no known eye-witnesses to the accident. Mr. Justice Murphy reviewed all the circumstances as revealed in the evidence, and stated at page 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its

> conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The *Lavender* decision applies with equal force to cases under the Jones Act. *Cox* v. *Roth*, 348 U. S. 207, 75 S. Ct. 242, 99 L. Ed. 260 (1955); *Johnson* v. *United States*, 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 468 (1948).

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949), a FELA case, Mr. Justice Black stated among other things, in reversing a directed verdict for defendant at page 63:

> "In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances to draw its ultimate conclusion on the issue of negligence. * * *"

In *Stone* v. *New York C. & St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441 (1953), a FELA case, a reversal of a verdict for plaintiff was reversed by this court. Mr. Justice Douglas at page 409 stated, among other things:

> "We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. * * * The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury. * * *"

In *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945), a reversal of a verdict for plain-

tiff in a FELA case was reversed by this court. Mr. Justice Black stated at page 604:

> "We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer 'becomes more imperative as the risk increases.' * * * The negligence of the employer may be determined by viewing its conduct as a whole. * * * And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

In applying the Jones Act it has been stated that the act is to be liberally construed in aid of its beneficent purpose to give protection to seamen and those dependent on his earnings. *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375, 53 S. Ct. 173, 77 L. Ed 368 (1932). The defendant at the trial stipulated that the deceased did not commit suicide and there was no foul play (R. 8). In addition the deceased is aided by a presumption that he used due care for his own safety. *United States* v. *Fotapulos*, 180 F. 2d 631, 637 (9 Cir. 1950); *Swetting* v. *Pennsylvania R. Co.*, 142 F. 2d 611, 612 (3 Cir. 1944); *Stark* v. *American Dredging Co.*, 66 F. Supp. 296, 301 (E. D. Penna. 1946).

In *Koehler* v. *Presque-Isle Transp. Co.*, 141 F. 2d 490 (2 Cir. 1944) cert. den. 322 U. S. 764, 64 S. Ct. 1288, 88 L. Ed. 1591 (1944), Judge Frank speaking for the court stated at page 491:

> "* * * An employer under the Jones Act is liable for 'negligence.' Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, and Alpha S.S. Corp. v. Cain, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086, teach us that 'negligence,' as used in that statute,

been caused by drowning. The court decided the case without a jury and found for plaintiff. Among other things Judge Freed stated at page 477:

> "Defendant has taken the position that even if there was negligence, it would be conjecture and speculation to say that such acts were the proximate cause of the injuries suffered.
>
> Modern decisions display great liberality in the construction of the Jones Act and the Federal Employers' Liability Act, 45 U. S. C. A. 51 et seq., in respect of proof of negligence and causation. * * *"

In *Johnson v. Griffiths S.S. Co.*, 150 F. 2d 224 (9 Cir. 1945) a decree dismissing a libel was reversed and the case remanded for ascertainment of damages. The deceased died when he fell into a hold. No one actually saw the deceased fall. There was evidence that the defendant's vessel was anchored in an open roadstead, under blackout conditions with no lights on deck; the weather was freezing and ice and sleet were on deck; the vessel was pitching heavily; the passageway in the forepeak was obstructed with dunnage and debris, the guard on the steampipe over which the men were required to walk was loose and shaking causing limited visibility from the leaking steam. Judge Garrecht stated at page 226:

> "* * * Under these circumstances the maintenance of an open hatch with no lifeline about it constitutes negligence which is so closely related to the injury in this case as to imply the conclusion that it was the proximate cause of the death.
>
> In determining proximate cause, it is not essential that the causal connection be shown by direct evidence; the causal connection can be shown by facts and cir-

cumstances which, in the light of ordinary experience, reasonably suggests that the defendant's negligence in the manner charged operated proximately to produce the injury. 38 Am. Jur. 334.

It is reasonable to conclude that the negligence established in this case was sufficient to have been the cause of the injury, if the deceased was at the point where this negligent condition prevailed. * * *"

See also *Hanley* v. *Erie*, 273 App. Div. 257, 77 N. Y. S. 2d 153 (1948), affirmed without opinion 298 N. Y. 816; 83 N. E. 2d 861 (1949).

In *Pearce* v. *Lehigh Valley R. Co.*, 157 F. 2d 252 (3 Cir. 1948) the plaintiff was injured when he fell off a catwalk on defendant's engine which had slush and water on it. It was claimed that there was insufficient illumination. In affirming a judgment for plaintiff, Judge O'Connell stated at page 253:

"This was evidence from which the jury might properly have concluded that the defendant had been negligent in failing to supply proper lighting and that by reason of an insufficiency of the lighting equipment the plaintiff suffered his injuries. We need not speculate whether the proximate cause of plaintiff's fall might also properly—or even logically—be attributed to some factor other than the lack of illumination. The plaintiff's proof was sufficient to go to the jury on negligence and causation. * * *"

In *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947), a judgment for defendant was reversed. The deceased was a cook on defendant's barge. Two of defendant's barges were moored near to each other. They had drifted

apart several feet. There was evidence that the guard rails surrounding the barges were rotten and broken in places and that they were so inadequately lighted that employees found it necessary to use flashlights. Judge Parker stated at page 785:

> "We think that the trial judge was in error in limiting the jury's consideration of negligence to what occurred in the attempt at rescue. While it is impossible to say with certainty what caused decedent to fall between the barges, it is a reasonable inference from the evidence that in attempting to go from one to the other he fell between them as a result of the defective lighting. There is nothing to indicate that he was shoved or pushed overboard, or that he was intoxicated, or that he was attempting to commit suicide. Under such circumstances the cause of the fall can no more be said to be speculative than in the case of a man found in the hold of a vessel beneath an unguarded hatch. See Johnson v. Griffiths S.S. Co., 9 Cir., 150 F. 2d 224. It is the duty of the vessel to provide a safe working place for members of its crew; and where there is evidence that it failed to do so and proof of circumstances from which it can reasonably be inferred that injury resulted from such failure, the case is for the jury. It is elementary that proximate cause need not be established by direct evidence but may be proven by circumstances. 38 Am. Jur. 1033. We think that the evidence of negligence with respect to the lighting of the barges is sufficient to take the case to the jury, but not the evidence as to mooring or as to the condition of the guard rails."

In *Bribazon v. Belships Co.*, 202 F. 2d 904 (3 Cir 1953) the plaintiff, a longshoreman, was injured when he fell in

the hold of a vessel, a decree for libelant was affirmed. Judge Hastie stated at page 909:

> "The record makes it abundantly clear that the single light cluster used by a gang did not and could not illuminate more than the small area where a particular lashing was being accomplished. The fixture had to be low and so directed as to provide clear illumination for the immediate operation. Thus, the cluster for Brabazon's gang was placed between forward and aft tenders on the port side of each row and directed to port as well as downward, so the workmen could see the entire lashing cable being attached at one end to a port side tender and at the other end to permanent structures of the hull on port side. This cluster cast no useful light to starboard. In addition, there was evidence that shadows of tenders would severely limit the effective range of individual lights and create a special lighting problem as men moved about between these vehicles. Yet, except for these lights for individual gangs, no illumination was supplied for any area but the access ladder from the deck. There was no provision for lights which could be placed to illuminate other areas of likely movement. And the record shows that men doing this type of work required tools and lumber which were scattered about the hold.
>
> . . . . . .
>
> Finally, it is clear on the record that the inadequacy of the board which broke to support a man's weight would have been apparent but for the darkness. Light would have made the danger obvious and would have enabled the workman to avoid it."

In *Armit* v. *Lovejoy*, 115 F. 2d 208 (3 Cir. 1940), a judgment for plaintiff was affirmed. The plaintiff was a chief

engineer on defendant's vessel. He slipped and fell on oil on the treads of a ladder. There was evidence that the light in the engine room was "not very good." Had splash plates been used near the engine the oil would not have been thrown on the ladder. Judge Jones stated at page 311:

> " * * * Consequently, negligence is the basis of an injured seaman's action for damages under the Jones Act. 35 Stat. 65, 45 U. S. C. A. 51; Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082. While negligence has been variously defined, it has lately been authoritatively redefined as being 'any conduct, except conduct recklessly disregardful of the interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm.' Restatement of the Law, Torts, 282. A standard of conduct established by law with respect to employers of seamen is that they shall provide their employees with a safe place in which to work. * * * "

The United States Court of Appeals in affirming the decision below cited *Johnson* v. *Palmer*, 220 F. 2d 279 (2 Cir. 1955) (R. 84). This opinion in turn incorporated and affirmed that of the trial judge. The deceased was a "float man" employed on defendant's tugboat. He died by drowning while his tug was removing two empty carfloats. There were no eyewitnesses to his death. The alleged evidence of negligence concerned signals and observations which had to be made before floats were moved. The court held that since there was no evidence that the deceased fell overboard when the signals and observations were supposed to have been made there was a failure of proof as to causal relationship. The opinion of the District Court is in *Johnson* v. *Palmer*, 129 F. Supp. 202 (E. D. N. Y., 1953). In the pres-

ent case the negligent acts complained of were continuing ones which existed at all times when the circumstances indicate the deceased went overboard.

In *Boston & M. R. R. v. Cibaina*, 148 F. 2d 150 (1 Cir. 1945), cert. den. 325 U. S. 873; 65 S. Ct. 1414, 89 L. Ed. 1991 (1945), the plaintiff was injured in defendant's roundhouse when struck by a backing locomotive. There was testimony showing that the lighting was dim. A judgment for plaintiff was affirmed. Judge Mahoney stated at page 151:

> "* * * The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard. * * *"

It would have been a simple matter for the defendant to have had more adequate lighting in the area of the four tugs. The risks in going from tug to tug with merely the benefit of a flashlight on a dark, cold night is obvious. In *Kangadis v. United States*, 121 F. Supp. 842 (S. D. N. Y. 1954) Judge Goddard stated at page 844:

> "* * * Consequently, to require a seaman to do his work in a dangerous manner, when there are other and safe ways to do it is negligent. * * *"

See also *Gold v. Groves*, 182 F. 2d 767 (3 Cir. 1950) which deals with the insufficiency of help to do assigned work.

There was evidence which would have justified a jury finding that the deceased was not provided with a safe place to work.

The deceased was last seen at about 7:00 p. m. (R. 12). The deceased was supposed to work until 1:00 a. m. (R. 12). There were no lights on the four tugs to which the deceased was assigned (R. 13, 14, 37, 41). The firemen who were as-

signal to the boats had to use flashlights because it was dark on the boats (R. 12). Lights would enable the men to see better, to check the water better, and to get from one boat to the other better (R. 14). The deceased was found with a flashlight in one of his hands (R. 29). One witness, who went to the tugs a little after 11:00 p. m., testified that the tugs were dark (R. 41) and he used either a flashlight or lantern (R. 42). He testified that the floodlights which were on the pier failed to light up the tugs which were not adjacent to the pier (R. 48). Another witness testified that the "Altoona" was dark and that the floodlights on the pier only lighted the part of the "Altoona" nearest the pier and the other part was dark (R. 51).

The floodlights on the pier were on top of the dispatcher's office and had two distinct beams or cone-shaped lights (R. 55). It would only help to light any tug alongside the pier (R. 55). The other tugs were dark. The "Altoona" and the other tugs were "up the dock" (R. 12).

It was practically undisputed that the tugs which were not tied adjacent to the pier were dark and that the one nearest the pier has the benefit of the floodlights only to a limited extent. No purpose was served in not supplying more light except to save the defendant the cost of some additional light bills.

The attorney for plaintiff asked a series of questions concerning the method of crossing from one tug to another and the advantages and disadvantages of crossing from one tug to another with a flashlight (R. 16, 17, 18, 26, 38, 45, 46, 47, 53, 54). This testimony was excluded by the court. At one point the court stated (R. 17):

> "The Court: Objection sustained. There has been no testimony that he crossed from one tug to another."

At another point the court stated (R. 46):

> "The Court: After reflection, please note my change in ruling as to Mr. Baker's being permitted to adduce testimony from the witness Andrei as to how he crosses from one tug to another and as to that no testimony will be permitted, and the objection of the defendant is sustained."

The court erred in preventing plaintiff from developing the evidence relating to the means of crossing from one tug to another. When the deceased's body was finally found it was nearby to the area where the tugs were located. The tugs had been tied to Pier H. The body was found off Pier F (R. 28). When last seen he was going in the direction of the tugs to which he was assigned (R. 12). His absence was noted about 12:15 a. m. (R. 19). His street clothes were still on the "Altoona" (R. 21). His overalls were still on the tug also (R. 30). When found in the water the deceased still had a flashlight in his hand (R. 29). He died of drowning.

The fact that on a winter night both the working clothes and the street clothes of the deceased were left on the tug and he was found in his underwear leaves only one probable inference, *i.e.*, that he was still on board the Altoona or one of the other tugs when he fell into the water. Only an emergency connected with his employment would cause a sober, responsible man to leave an engine room where he was changing clothing to run out, flashlight in hand. Furthermore, he would not normally go about in a state of undress on the pier or elsewhere.

There was no evidence that the vessels pitched or moved or that anything happened which would have caused the deceased to be thrown off one of the tugs. The most logical inference to be drawn from the established facts was that

the deceased fell into the water while crossing from the [illegible] to tug in the darkness.

There were additional facts which help establish the sequence of events that evening. The deceased had checked the four tugs and had reported back about 7:00 p. m. (R. 11). He was due to make his next report at 1:00 a. m. (R. 12). His duties were more fully described by one witness (R. 24).

> "A. The duties of a watch fireman like that assigned to watch boats, he goes aboard the boats and the first thing he does is attend to the water in the boiler. If you don't have water there, you will have a burned boiler. Then he goes downstairs and looks at the fires. If the fires need (fol. 29) tending, he tends to them. If the steam is low, he will raise the steam—75 to 100 pounds of steam. He can use the injector; he can use it to pump the water out of the bilges.
>
> Then he checks on the tank to see it is full. Those are his duties. He can fix those fires up and the Scotch boiler, which is a three-fire Scotch; those fires can be fixed up where you don't have to touch them for two or three hours. That is the reason they gave them two or three boats to watch. If he has a boat next to him with a diesel, he would have to take more care of that boiler, because he was taking steam off there to keep the diesel warm. That would be his duties."

At about 5:00 p. m. before the deceased came on duty another fireman had "checked" these tugs. He had pumped the boilers up with water, put coal on the fires, and pumped the bilges (R. 35). The fires would have kept up normally for two to two and a half hours (R. 36). After he had loaded the boilers with water, he had shut off the injectors and valves on all three steamboats (R. 36). This had been done between 5:00 and 5:30 p. m. (R. 37). At about 11:00 p. m. another fireman who was then assigned to two of the

four boats to which the deceased had been assigned, noticed that the "Princeton" and "Williamsport" were both in "poor shape" and that the injector was open on the "Williamsport." He stated that usually before a fireman leaves a boat he throws coal over the fire and they are "blacked out" with coal, but at this time they were all red coals. It appeared as if the fires had not been attended to for about three hours (R. 39). The fact that the injector had been turned on indicated that the boiler had needed water and someone had put the injector on to put water into the boiler (R. 42). The injector is operated by hand (R. 41).

Another fireman who was assigned to two tugs including the "Altoona" came on duty at about 12:30 a. m. (R. 49). He found that there "wasn't much fire" on the "Altoona" and that the water and steam were "low" (R. 50). He estimated that the fires had been unattended between two to four hours (R. 50).

At about 12:15 a. m. the assistant foreman of engines went to look at the fires on the tugs the deceased had attended and found they were "practically out" (R. 19). The fires on the "Altoona" were "practically out" (R. 19).

These facts all establish as a matter of reasonable probability that the deceased fell into the water between 7:00 p. m. and 10:00 p. m. They also establish that deceased interrupted the completion of duties on his tugs. The fact that he fell into the water before he had completed changing his clothes indicates that this occurred in the early part of his watch, particularly when taken in conjunction with the condition of the fires on the tugs as found later on.

Harold F. Cunliffe testified that he had been assigned to two tugs in another tier during the same period the deceased was assigned to four (R. 37). He testified all the tugs were dark (R. 38). Another witness, Charles H. Andrei, testified that he was assigned from 11:00 p. m.

to 7:00 p. m. to only two of the four boats to which the deceased had been assigned (R. 38). He testified that the tugs were unlighted and were dark (R. 41). This witness also testified that nobody "was actually capable of taking care of more than two tugs" (R. 47). Bernard P. Casamento, who worked that night also testified that he was assigned to two tugs of the four to which the deceased had been assigned (R. 49). James H. Corcoran also testified that he had been assigned to two tugs that night (R. 50).

The U. S. Department of Commerce monthly meteorological summary gave some information relative to weather conditions (Pl. Exh. 12, R. 82A). The hourly temperature chart shows that it was 32 F. at 1:00 a. m. on December 25th; that it varied slightly until 8:00 a. m. when it became slightly warmer until 11:00 p. m. it was up to 41 F. One of the witnesses, who was a tug fireman, and who started to work at midnight stated that he observed ice on the four tugs (R. 56). The only place he specifically recalled seeing the ice was on "the front bumping mat" (R. 79). These mats were located on the bow in front of the tug (R. 80). One witness, Frederick A. Stetson, was an assistant foreman of engines at the time of the accident. He was on the boats at about 12:45 a. m. (R. 39). He varied his testimony from that given in a deposition which he signed on April 27, 1951 (R. 23). He said that the condition of the weather on the night of the accident was about 10° F. (R. 24). He testified that he said in his deposition that the decks of the tugs are washed down every night by the crews when they tie up (R. 22). He denied at the trial that they would do this in the wintertime "because they would have ice all over the thing" (R. 22).

The deceased was found with a flashlight in his hand. Whether he used it at the time prior to his death we do not know although we must presume he exercised due care for

his own safety. The usefulness of a flashlight is limited where a person is crossing tugs which have a certain amount of instability and motion even in the still water next to a pier. The person using the flashlight can only see a limited area if using it while crossing over the sides of the tugs. These tugs do not have sides which tie up flush against each other (see Deft. Exh. E). There is some space and some play between these tugs. The trial court, as discussed before, refused to permit testimony concerning the manner of crossing from tug to tug on the ground that there was no evidence that the deceased fell into the water while crossing from tug to tug. This evidence would have buttressed the finding that the lighting conditions on these tugs created foreseeable danger to deceased. The inference that the insufficiency of light caused or contributed to the deceased's fall into the water is logical and consistent with all the evidence.

Furthermore, there was evidence that a man could normally take care of only two tugs at a time. The deceased was assigned to four. All other of defendant's employees who testified had been assigned to only two tugs that night. If the deceased had been assigned to two tugs he would have had to cross from tug to tug less frequently; he would have had more time to check his tugs and keep them in proper working order; there would have been less likelihood of an emergency developing on one of the tugs because of insufficient water or steam, etc. This factor contributed to the death of the deceased.

There was some evidence relating to ice, but since there was no proof that this condition did exist all over the tugs, or at least along the side of the tug where the deceased usually crossed, this evidence, by itself, cannot be causally related to the death of deceased. However the weather conditions, taken in connection with the fact that the deceased was found in his underwear do permit

certain inferences to be made concerning the things which the deceased was doing at the time of his death. (See R. 44, 45, 46.)

The deceased obviously was not strolling on deck to get a breath of fresh air in his underwear at the time he fell into the water. The cold waterfront on a December night is hardly the place to tarry without proper covering. Under the circumstances a jury might infer that the deceased made his passage from vessel to vessel with some dispatch. The "Altoona" was nearest the dock (R. 35). The outermost tug was the "Williamsport" (R. 35). The deceased's clothes were on the "Altoona" (R. 29). The injector had been left on the "Williamsport" (R. 40). These injectors are operated manually by the tug fireman, and are left on either for a short period of time or an hour or two hours. They are used to fill the boilers with the proper amount of water. Since the deceased had turned on the injector, but had never turned it off it is reasonable to infer that he was in the process of returning from the "Williamsport" where he went because of an emergency and was returning to the "Altoona" across the decks of the other two tugs where his clothing was located when he fell into the water. One can well picture the shivering figure of the deceased as he ran and jumped in the cold darkness, flashlight in hand, from tug to tug. A misjudgment in the darkness and shadows; he fails to board a side, and sinks into the waters of the Hudson River.

In the light of the decisions, discussed above, there was evidence both of negligence and causal relationship.

POINT II

A jury could have found from the evidence that the deceased was covered by the provisions of the Jones Act.

The trial judge specifically refrained from ruling on the issue relating to the applicability of the Longshoremen's and Harbor Workers' Compensation Act to the present case, but based his decision on the alleged failure of proof of proximate cause (R. 57). The Circuit Court of Appeals did not discuss the issue either, but rather decided the issue solely as one of proximate cause (R. 84).

The facts concerning the employment of the deceased were not disputed. The deceased was an "extra fireman." He would be dispatched to whichever tug or tugs might need a fireman. He didn't work on the same tug or tugs all the time. Sometimes he would be assigned to tugs which went out and sometimes to tugs which were tied up (R. 13). On the night of December 25, 1949, the deceased was the only "fireman" assigned to four of defendant's tugs (R. 14). These tugs operated the day before and worked the day after (R. 15). They were tied up temporarily for the purpose of being used in navigation again (R. 16). The deceased had the duty to take care of the boilers properly, to see that the fires were there, to see the amount of steam in the boilers, etc. (R. 19, 25), it was necessary to tend these fires so that the vessels could go out (R. 19). The boilers were tended so that they would be "near a head of steam when the crew reported to take the tug into service in the morning" (R. 21). The deceased was assigned to work by a "crew dispatcher" (R. 25). The deceased changed his clothes on the tug "Altoona" in the room where firemen usually change clothes (R. 30). A watch fireman on a tug tied up has essentially the same duties

as a fireman on a tug in running operation (R. 32). The qualifications for the jobs are the same (R. 33). The defendant assigned men to vessels according to seniority (R. 33).

From the foregoing it appears that the job classification of the deceased "fireman" is one traditionally assigned to a member of the crew of a vessel whose duties relate to the maintenance of motive power on the vessel, and the duties which the deceased performed with reference to each of the four vessels he "watched" as a fireman were duties traditionally performed by members of the crews of such vessels.

Taking the meaning of the word "crew" in the context of defendant's operations, it is quite reasonable to find that the decedent was a member of the crew of all four vessels he attended. Suppose one fireman who was regularly assigned to each tug stayed to watch that tug alone each night. Certainly he would not be regarded as other than a "member of the crew." Suppose for convenience one fireman, regularly assigned to a tug, stood watch for the firemen of three other tugs, and was injured while checking a fire on another tug. Suppose, as is the case here, a defendant operates a fleet of tugs and keeps a crew list and assigns men to one or more tugs as they find necessary to perform duties usually performed by seamen to aid these vessels in navigation. In such a situation, it makes no difference practically whether a man is officially designated a crew member of vessel A, B, C, or D. He is a crew member of each vessel for which he performs some service.

The question of whether or not the deceased was a member of the crew of a vessel was one for the jury to determine in view of the circumstances. In *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251; 60 S. Ct. 544, 84 L. Ed. 738 (1940) Chief Justice Hughes stated at page 256:

"Petitioners urge that the question whether decedent was a member of a 'crew' was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of a 'crew' as distinguished from a longshoreman or laborer at work upon a vessel. We are unable so to conclude.

"The word 'crew' does not have an absolutely unvarying legal significance. * * *

* * * * * * *

* * * Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's findings."

In *Texas Company v. Gianfala*, 222 F. 2d 382 (5 Cir. 1955) the deceased was working on board defendant's drilling barge at the time of his accident. The trial judge refused to direct a verdict for defendant on the ground that the deceased was not a seaman and member of the crew as a matter of law. A verdict for plaintiff was rendered. On appeal to the United States Court of Appeals, Fifth Circuit, the judgment was reversed on the ground that as a matter of law, the deceased was not a member of the ship's crew. This decision was reversed *per curiam* and the original judgment reinstated in *Gianfala v. Texas Company*, __ U. S. __, 76 S. Ct. 141; __ L. Ed. __ (1955).

This court cited the *Barrett* case supra; *Walker v. Mississippi River Steel & Grain Co.*, 202 F. 2d 383 (6 Cir. 1953), cert. den. 346 U. S. 817, 74 S. Ct. 29, 98 L. Ed. 344 (1953); *Samuelsen v. Mississippi Shipping Co.*, 199 F. 2d 715 (4 Cir. 1952); and *Gulfstream Canal Co. v. Tenace*, 165 F. 2d 301 (1 Cir. 1948).

In addition to the above cases see also on the issue of "member of a crew" as a question of fact, *Bouchie v. Shamrock Towing Co.*, 139 F. 2d 674, 676 (2 Cir. 1943); *Schaad v. American Dredging Co.*, 138 F. 2d 534, 537 (3 Cir. 1943).

There can be little question that a "fireman" may be covered by the Jones Act, 46 U. S. C. A. 688 (hereinafter referred to merely as the Jones Act). See *Samanchin v. Massman Const. Co.*, 199 F. 2d 715 (4 Cir. 1952); *Pillard v. Seas Shipping Co.*, 146 F. 2d 875 (2 Cir. 1945); *The Emmy*, 55 F. Supp. 60 (S. D. N. Y. 1944).

In *Perry v. U. S. Employees' Compensation Commission*, 27 F. 2d 144 (N. D., Cal. 1928), the decedent was the master of one tugboat. His vessel and another vessel of his employer were anchored for the night. He went to the other vessel in the morning to start its engine. An explosion occurred on the other vessel killing decedent. The deputy commission found that the decedent was not covered by the LHWCA at the time of his death. In affirming, the district court stated at page 145:

> "* * * It appears, however, that the vessel upon which he was master belonged to the owner of the vessel upon which he was killed, and that his acts aboard the Ellen were connected directly with the navigation of the Ellen. Perry and Lorentzen had virtually exchanged duties pro tem. * * *."

In *Long Island R. Co. v. Lowe*, 50 F. Supp. 944 (E. D. 1943), the decedent had been assigned as a mate to a tug used to tow and transfer carfloats in the harbor. He performed various deck duties on the tug and when floats were being docked he stood on the bow of the float to signal the captain of the tug and handle the lines of the float. The deputy commissioner had concluded that the deceased was

not the member of the crew of any vessel when he was killed when handling lines on a float and falling overboard. Judge Inch, reversing, stated at page 945:

"The explanation for the conclusion reached by the long experienced Deputy Commissioner is found in his other findings which are in substance that Gallagher had not worked in the employment in which he was working at the time of his death for substantially the whole of the year immediately preceding same; that he had previously been employed in various capacities incidental to the transfer of freight in and about the harbor of New York. That during this period he had worked principally aboard the employer's tugs and carfloats, that he had no permanent assignments to any vessel and had been assigned as floatman, bridgeman, deckhand, aboard tugs as mate, that he lived ashore, was not furnished meals aboard vessel, was paid by the day, was not required to have a license of any kind. That none of the vessels upon which he was employed operated outside the limits of New York harbor.

The captain of the tug was a witness before the Deputy Commissioner and testified that Gallagher was a member of the crew of the tug on the day in question and described his duties as mate. That these duties were, among other things, when preparing to dock a float to stand on the bow of the float, handle the lines and give signals to the captain. That he could on request of the captain and did pilot the tug when the captain was present. That Gallagher had worked in this way on the tug about a week prior to his death. That the tug had three crews, each consisting of seven men, a captain, first mate, floatman, engineer, oiler and a fireman. That Gallagher was borne on less an

extra man because that was an extra crew, but for the week Gallagher was working on the tug and at the time of his death he was first mate.

. . . . .

It seems to me however, that this conclusion overlooks Gallagher's expressly and properly found participation, as a part of his duty, in the actual navigation of the tug. That this part of his duty, so performed, seems to me to make the position of the Deputy Commissioner untenable as a matter of law.

In *Lukos v. Chesapeake & O. Ry. Co.*, 120 F. Supp. 296 (W. D. Mich. 1954) the question of whether the plaintiff was entitled to sue under the Jones Act was determined as a preliminary matter by the trial judge. It was stipulated that the plaintiff was part of a "marine labor gang" employed in general cleaning work on defendant's vessels. The "gang" worked on vessels under way, moored to piers or completely removed from service. They worked a straight 40 hour week from 7:30 a. m. to 4:30 p. m. Monday through Friday. They ate and slept on board. They were paid on a separate payroll from that of ship's personnel. The plaintiff worked on 5 vessels from April to October of 1950. While on board one of defendant's steamers which was in navigation the plaintiff was injured. In holding that the Jones Act did apply, Judge Starr stated at page 300:

> "It has generally been held that navigation is not limited to 'putting over the helm' and that 'members of the crew' are not confined to those who 'hand, reef, and steer.' Therefore, it seems clear that the type of work performed by plaintiff and other marine laborers on the defendant's vessels was such as has traditionally been done by seamen and members of the crew and can properly be considered in aid of navigation. See

> Norton v. Warner Co., 321 U. S. 565, 64 S. Ct. 747, 88 L. Ed. 931, "The fact that plaintiff and other marine laborers did not remain on board ship during week-ends, or that they were on a separate payroll, or that their hours were different from those of other vessel personnel, will not bar plaintiff from classification as a seaman-member of the crew."

A ship is in navigation, although docked, if it remains in readiness for another voyage. *Carambey v. Cape Cod S.S. Co.*, 123 F. 2d 991 (1 Cir. 1941). The tugs which the decedent was serving were all docked temporarily. They were working tugs and the only reason they were docked was because they were not working that night. They were, however, kept in readiness for work the next day. There was direct testimony that the decedent was not a watchman in the ordinary sense but was a 'watch fireman' whose duties concerned keeping the fires of the vessels going so that the vessels could operate the next morning. The tending of fires on a vessel, etc., whether at sea or at anchor, are duties traditionally performed by members of the crew of a vessel and undoubtedly concern the navigation of the vessel. Because of the manner in which the defendant operated its tugs and assigned crew members to perform joint duties it is clear that the decedent had a permanent connection with the defendant's fleet of vessels and a specific connection with every vessel of which he served. Under those circumstances a jury could have determined he was a member of the crew of all the vessels he served and hence was covered by the Jones Act. Although the court did not specifically rule on the question as a matter of law, the issue is one which is [illegible] plaintiff's cause of action under the Jones Act is discussed here.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

NATHAN BAKER,
Counsel for Petitioner.

BAKER, GARBER & CHAZEN,
On the Brief.

January 31, 1956.

Statement of the Case

This action was brought pursuant to the Jones Act (46 U. S. C. A. §688 et seq.) to recover damages sustained as the result of the death of plaintiff's intestate allegedly through the negligence of the defendant. The defendant entered a general denial in answer to the allegations of negligence and in addition to an affirmative partial defense of contributory negligence alleged as a complete defense that the plaintiff's sole remedy was that provided by the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §901 et seq.). The applicability of the latter Act to the case at bar was never determined since the Court directed a verdict in favor of the defendant on the ground that there was no evidence to causally connect the alleged negligence of the defendant with the decedent's death.

On December 25, 1949, the decedent was employed as a "watch-fireman" by the defendant and assigned to watch four of defendant's tugboats then moored abreast of Pier H on the Hudson River in Jersey City, N. J. (p. 4a).*

The boats to which the decedent was assigned were in the third tier of boats from the outboard end of the dock (p. 2A). At that time these tugs were not in navigation (p. 3A). There was no crew or captain aboard (p. 8a); no logs were kept (p. 4A); and no navigation lights were shown (p. 12A). The decedent was the sole person assigned to these ships (p. 8a). He slept ashore (p. 3A); worked an eight hour tour (p. 7a); checked in and out of the job

*References to Plaintiff-Appellant's Appendix are designated by "a". References to Defendant-Appellee's Appendix are designated by "A"